No. 135

In the

Supreme Court of the United States

OCTOBER TERM, 1970

ORGANIZATION FOR A BETTER AUSTIN, et al.,
Petitioners,

vs.

JEROME M. KEEFE,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF FOR PETITIONERS

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OPINION BELOW

The opinion of the Appellate Court of Illinois is reported at 115 Ill. App. 2d 236, 253 N.E.2d 276 (1969), and is set out in the separate Appendix (A. 70).

JURISDICTION

The judgment of the Appellate Court of Illinois, First District, was entered on September 29, 1969. On October 30, 1969, a petition for rehearing was denied, but on that date the opinion entered September 29, 1969 was modified. A timely petition for leave to appeal was denied by the Supreme Court of Illinois on January 27, 1970. The petition for certiorari was filed on April 27, 1970, and was granted on June 22, 1970. This Court's jurisdiction rests on 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,
First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution,
Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

1. Whether an injunction barring petitioners from distributing noncommercial literature in respondent's city of residence is an unconstitutional restraint on freedom of speech and the press in violation of the First and Fourteenth Amendments.

2. Whether the peaceful and orderly distribution of noncommercial leaflets and picketing can be prohibited by injunction everywhere in a city of 18,000.

STATEMENT OF THE CASE

The petitioners, since December 20, 1967, have been enjoined by the Circuit Court of Cook County "from passing out pamphlets, leaflets or literature of any kind, and from picketing anywhere in the City of Westchester, Illinois," a city of 18,000. (A. 70)

The petitioner, Organization for a Better Austin ("OBA"), is a racially integrated community organization in the Austin neighborhood in the City of Chicago which is funded by the Austin Clergy Council (A. 32-33, 42, 56-57). The individual petitioners are an officer of the OBA, the chairman of its Real Estate Practices Committee, and an active member (A. 2, 5, 32, 49).

Respondent Jerome Keefe is a real estate broker whose office is in the Austin neighborhood. He resides in Westchester, Illinois, a suburb of Chicago (A. 17, 23, 34).

For a number of years, the boundary of the black segregated area of Chicago has moved progressively west to Austin, and a major problem facing this neighborhood is the rapidly changing racial composition of its residents (A. 32-35). In its efforts to stabilize the community, the OBA opposed and protested certain real

estate practices which it felt fomented panic among the residents of the blocks undergoing racial change; specifically, the OBA objected to any solicitation of real estate listings in areas of racial change (A. 18-19, 27, 35-36, 49). Justin McCarthy, President of the OBA, testified that the organization is seeking to prevent the mass exodus of white people from the community; it does not object to the entry of blacks into the community (A. 32-36, 42, 57).

Since 1961, respondent has from time to time actively sought out sellers of homes by means of flyers, phone calls and personal visits to residents of the area in which his office is located, without regard to whether the residents solicited have expressed any desire to sell their homes (A. 24-25, 29). From 1961 to 1966 respondent's office was on Cicero Avenue in Chicago (A. 23). During a substantial portion of that period, Cicero Avenue was on the boundary of racial change (A. 34). In November, 1966, he moved his office further west to Laramie Avenue which, by the time of the issuance of the injunction in 1967, was then on the western boundary of racial change (A. 22, 34-35).

On August 20, 1967, respondent solicited Austin residents to list their homes for sale by distributing printed cards door to door in the area immediately west of Laramie Avenue. Petitioners believed that this solicitation constituted panic peddling (A. 23-25, 36-37; Pl. Ex. 1; A. 10, 20; Def. Ex. 1; A. 11, 39-40; Def. Ex. 2; A. 12, 40; Def. Ex. 3; A. 13-15, 55-56). Petitioner Justin McCarthy testified that he believed that respondent's solicitation in an area near a racial boundary was enough to panic certain white residents into leaving Austin (A. 36-37).

Subsequently, the OBA arranged a community meeting with respondent to seek changes in his real estate practices (A. 17-18, 50-51). Residents of the blocks solicited attended (A. 38). Respondent was asked questions about his real estate practices. It was claimed he was a panic seller (A. 18, 27-29, 38, 51-53). At the conclusion of the discussion, respondent was asked to sign a pledge that he would not "solicit property, by phone, flyer or visit, in the community of Austin" (A. 19, 28-29, 61). Respondent refused to sign this no-solicitation agreement (A. 28-29, 53).

Thereafter, during September and October, 1967, members of the OBA on five different occasions distributed leaflets in respondent's city of residence, Westchester, Illinois, a suburb of Chicago. Four different leaflets were used. These leaflets were critical of respondent's real estate practices in the Austin neighborhood of Chicago. One of the leaflets set out the card respondent used to solicit listings; quoted him as saying "I only sell to Negroes," cited a Chicago Daily News article describing his real estate activities and accused him of being a "panic peddler" (Pl. Ex. 1; A. 10, 20). Another leaflet stated that respondent admitted he had never done business in anything but a racially changing neighborhood, that he only sold to Negroes, that he refused to sign a no-solicitation agreement, that "When he signs the agreement, we stop coming to Westchester," and that he has been accused of panic peddling, and urged the reader of the leaflet to call him and tell him to sign the no-solicitation agreement (Def. Ex. 2; A. 12, 40). A third leaflet was similar to this leaflet (Def. Ex. 1; A. 11, 39-40). The fourth leaflet had printed material on both sides (Def. Ex. 3; A. 13-15, 55-56). On one side was the text of a television

editorial discussing the OBA's campaign against panic peddling. The other side stated that complaints against respondent had been filed with a state department and the Mayor's Commission on Human Relations, and urged calls or telegrams to that Commission.

On several days, leaflets were given to persons in a Westchester shopping center (A. 39, 53, 55, 69). On two other occasions, leaflets were passed out to some parishioners on their way to or from respondent's church in Westchester (A. 40, 54-55, 69). Leaflets were also left at the doors of residences in respondent's neighborhood (A. 46-47, 53, 60, 69).

There is no allegation or evidence that petitioners picketed in Westchester.

The trial court found that petitioners' "distribution of leaflets was on all occasions conducted in a peaceful and orderly manner, did not cause any disruption of pedestrian or vehicular traffic, and did not precipitate any fights, disturbances or other breaches of the peace" (A. 69).

Respondent sought an injunction in the Circuit Court of Cook County, Illinois, to enjoin the distribution of these leaflets.[1] On December 20, 1967, the trial court entered a temporary injunction enjoining petitioners "from passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere in the City of Westchester, Illinois" (A. 70).

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[1] Respondent also sought an injunction against picketing of his place of business in Austin, which on several occasions was peacefully picketed by petitioners (A. 4, 68-69). The trial court did not enjoin petitioners from picketing respondent's place of business (A. 70), and respondent did not appeal from this decision; thus, such picketing is not in issue before this court.

Petitioners took a direct appeal to the Supreme Court of Illinois. That court, on the ground that it had no jurisdiction on direct appeal in this case, transferred it to the Appellate Court of Illinois, First District.

The Appellate Court of Illinois, First District, affirmed the injunction order in a judgment and opinion entered September 29, 1969, which opinion was modified on October 30, 1969. The Appellate Court of Illinois held that petitioners' distribution of leaflets in Westchester is not protected by the First Amendment because "[t]he purpose of the defendants [petitioners] was not to inform the public of a matter of public interest, but the sole purpose was to force plaintiff to sign a 'No Solicitation' agreement," and that respondent's "right of privacy" was invaded (A. 85). The Appellate Court also held that this injunction which prohibits distribution of literature of any kind or picketing anywhere in Westchester, a city of 18,000, is not overly broad (A. 86). A petition for rehearing was denied, and the Supreme Court of Illinois on January 27, 1970, denied a timely petition for leave to appeal to that court.

SUMMARY OF ARGUMENT

I. A. The First Amendment protects the publication and distribution of both leaflets and newspapers. *Lovell* v. *Griffin*, 303 U.S. 444 (1938). The orderly distribution of literature door to door and in public places may not be prohibited. *Martin* v. *Struthers*, 319 U.S. 141 (1943); *Schneider* v. *State*, 308 U.S. 147 (1939). The distribution of literature by hand is a necessary and effective method of communication for those persons and groups who lack ready access to more expensive media.

B. This injunction which has been in effect for over two and one-half years is a prior restraint forbidden by the First Amendment. *Near* v. *Minnesota*, 283 U.S. 697 (1931). The injunction here dramatically illustrates the more serious impact and consequence of prior restraint as compared to subsequent punishment. Should this Court declare the injunction unconstitutional, petitioners will still have been barred from exercising First Amendment rights for over two and one-half years since they could not have challenged the injunction's constitutionality in a contempt proceeding brought for its violation. *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967); *Faris* v. *Faris*, 35 Ill. 2d 305 (1966).

C. The Illinois courts justify disregard of these First Amendment principles on the basis of two factors, purpose and privacy. These justifications cannot withstand constitutional scrutiny.

1. Petitioners hoped that by informing the residents of Westchester of certain of respondent's real estate practices in Austin, respondent would agree to stop such practices. Here, as in most speech, the goal is more than public information; it is directed toward influencing events and action. The protections of the First Amendment are not limited to those whose only interest is public information. *Terminiello* v. *City of Chicago*, 377 U.S. 1 (1949). Disagreement with a disseminator's purpose does not justify a court in restraining the distribution of literature. *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964). *Hughes* v. *Superior Court*, 339 U.S. 460 (1950).

2. This injunction cannot be justified on the basis of protecting respondent's privacy. The concept of privacy does not provide a basis for the suppression of literature on subjects of public interest and concern, especially where falsity has not been found. *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967).

Respondent's purported privacy interest is far less substantial than those asserted in the past in attempts to justify unconstitutional restraints on literature distribution. *Martin* v. *Struthers,* 319 U.S. 141 (1943). Illinois appears to be alone in defining petitioners' presence in Westchester passing out leaflets critical of respondent as an invasion of his privacy. Respondent's interest in denying petitioners access to Westchester is not one which has heretofore been protected under what is termed "the law of privacy." Prosser, *Handbook of the Law of Torts,* §112 (3rd ed., 1964). The courts of Illinois may not, under the guise of privacy, insulate respondent from exposure and criticism in Westchester of his real estate practices in Austin, and grant him the power to censor the dissemination of literature to other residents of his municipality.

II. The injunction is overbroad. In addition to a blanket prohibition on literature distribution, the injunction also contains a prohibition on picketing anywhere in Westchester, absent any allegation or evidence that petitioners had engaged in picketing in Westchester. This injunction against picketing is unrelated to the reasons for which picketing can be restricted or enjoined, and is thus overbroad. *International Brotherhood* v. *Vogt,* 354 U.S. 284 (1957); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940).

ARGUMENT

I. THIS INJUNCTION WHICH BARS PETITIONERS FROM DISTRIBUTING ANY LITERATURE IN THE VILLAGE OF WESTCHESTER IS AN UNCONSTITUTIONAL RESTRAINT ON FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH AND THE PRESS

> "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938). See also *Murdock* v. *Pennsylvania*, 319 U.S. 105, 108, 111 (1943).

The facts in this case "reflect an exercise of these basic constitutional rights in their most pristine and classic form." *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963). Petitioners' distribution of leaflets in Westchester "was on all occasions conducted in a peaceful and orderly manner, did not cause any disruption of pedestrian or vehicular traffic, and did not precipitate any fights, disturbances or other breaches of the peace" (Finding of the trial court, A. 69). Nevertheless, the courts of Illinois have issued and sustained an injunction prohibiting petitioners from distributing any literature in Westchester on the grounds that petitioners did not have a proper purpose for distribution of literature and that distribution of literature in Westchester concerning respondent's real estate practices in Chicago invaded his privacy. This

restraint has been in effect for over two and one-half years.

A. Petitioners' Literature and its Distribution in Westchester is Constitutionally Protected.

The manner and place of petitioners' distribution of literature have been repeatedly held to be free from restraint. Westchester could not have passed an ordinance which made Westchester off limits for distribution of literature as the Court has done here by injunction. *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Jamison* v. *Texas*, 318 U.S. 413 (1943). Door to door distribution of non-commercial literature cannot be prohibited on the grounds that such distribution may disturb some residents, *Martin* v. *Struthers*, 319 U.S. 141 (1943), or may be part of a fraudulent solicitation. *Schneider* v. *State*, 308 U.S. 147, 164 (1939). Distribution in public places cannot be prohibited on the ground that recipients of literature may litter. *Schneider* v. *State*, 308 U.S. at 162-163. Indeed, protection of leaflets has been considered so important as to prohibit a tax on their distribution, *Murdock* v. *Pennsylvania*, 319 U.S. 105, 113-117 (1943), and a requirement that leaflets "have printed on them the names and addresses of the persons who prepared, distributed or sponsored them." *Talley* v. *California*, 362 U.S. 60, 63-64 (1960).

The basis of the constitutional protection afforded the distribution of literature has been stated as follows: "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell* v. *Griffin*, 303 U.S. at 452, quoting from *Ex Parte Jackson*, 96 U.S. 727 at 733. In a democracy, leaflets have an especially

important role to play. "Door to door distribution of circulars is essential to the poorly financed causes of little people." *Martin* v. *Struthers*, 319 U.S. at 146. Leaflets have proved to be "most effective instruments in the dissemination of opinion." *Schneider* v. *State*, 308 U.S. at 164. If the Illinois courts are now permitted to carve the distribution of leaflets out of the First Amendment,[2] persons and groups such as petitioners will be denied the same right to express their views as those who have greater access to more expensive media. *Cf. Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 389-390, 400 (1969); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964); Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967).

B. The Injunction Issued in This Case Is an Invalid Prior Restraint.

Not only have the Illinois courts disregarded these First Amendment principles with respect to the distribution of literature, but they have chosen to prohibit petitioners' distribution of literature by injunction, a form of prior restraint that has long been forbidden. *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 149 (1967) (opinion of Mr. Justice Harlan).[3] The Court in *Near* overturned as a prior re-

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[2] The Appellate Court of Illinois stated in its opinion that petitioners' "right of 'free speech' is not involved here" (A. 86).

[3] While the prohibition on prior restraints may not be absolute, deviation from the no-prior restraint doctrine has been "only in exceptional cases"; this is clearly not one of those exceptional cases. *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 47 (1961); *Near* v. *Minnesota*, 283 U.S. at 715-716.

straint an injunction issued by a Minnesota court against the continued publication and circulation of a newspaper found to be "chiefly devoted to malicious, scandalous and defamatory articles." *Near* v. *Minnesota,* 283 U.S. at 706, 712, 720-722.

Prior restraints on the distribution of non-commercial leaflets are equally proscribed. *Lovell* v. *Griffin,* 303 U.S. at 452. In *Lovell,* the Court held an ordinance prohibiting the distribution of literature within city limits without a permit from the city manager to be an unconstitutional prior restraint. *Lovell* v. *Griffin,* 303 U.S. at 451-452; accord, *Schneider* v. *State,* 308 U.S. 147, 161-162, 164-165 (1939).

This Court upon review of the history of the struggle against licensing which produced the conception of liberty embodied in the First Amendment, noted that a "leading purpose" of the First Amendment was the elimination of prior restraints. *Lovell* v. *Griffin,* 303 U.S. at 451-452; see also *Carroll* v. *Princess Anne,* 393 U.S. 175, 181 (1968); *Near* v. *Minnesota,* 283 U.S. at 713-718; Emerson, *The Doctrine of Prior Restraint,* 25 Law and Contemporary Problems 648 (1955). The reasons for the proscription against prior restraints are that "[o]rdinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint." *Carroll* v. *Princess Anne,* 393 U.S. at 180-181; *cf. New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967).

This difference is dramatically illustrated in the use of of the injunction as a prior restraint. In *Walker* v. *City of*

Birmingham, 388 U.S. 307 (1967), this Court held that a state can refuse to permit challenge to the constitutionality of an injunction restraining speech activities in contempt proceedings brought for violation of the injunction.[4] This means that should this Court declare the injunction here unconstitutional, petitioners will still have been barred from the exercise of their First Amendment rights for over two and one-half years. *Cf. Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 151, 157-158 (1969). This is the evil which the proscription of prior restraints was designed to prevent. *Near* v. *Minnesota*, 283 U.S. 697, 713-718; *Carroll* v. *Princess Anne*, 393 U.S. at 181, 184. If respondent, based on the purported invasion of privacy in this case, had obtained a judgment for damages against petitioners, the restraint on petitioners' rights of speech and the press would be far less complete. The potential inhibiting effort of subsequent punishment cannot be doubted.[5] However, if such a damages award is found by a higher court to be unconstitutional, petitioners would still have been able to exercise their First Amendment rights while vindicating them. They could have chosen to risk subsequent damage actions knowing that they could present their constitutional defenses in these actions; if they had violated the injunction issued in this case, they would have no such opportunity.

If the comparatively minimal restraints of taxation in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), and dis-

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[4] Illinois prohibits such challenges as did Alabama in *Walker*. *Faris* v. *Faris*, 35 Ill. 2d 305, 309, 220 N.E. 2d 210, 212-213 (1966); *Cummings-Landau Co.* v. *Koplin*, 386 Ill. 368, 383-384, 54 N.E. 2d 462, 469 (1944); *City of Chicago* v. *King*, 86 Ill. App. 2d 340, 354-355, 230 N.E. 2d 41, 48 (1st Dist. 1967).

[5] See *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

closure in *Talley* v. *California*, 362 U.S. 60 (1960), are unconstitutional restraints on the distribution of leaflets, it is inconceivable that this gross prohibition on petitioners' leaflets can survive constitutional scrutiny.

C. The Justifications Used by the Illinois Courts to Sustain This Injunction Cannot Withstand Constitutional Scrutiny.

The Illinois Appellate Court in finding that petitioners' "right of 'free speech' is not involved here" (A. 86) and in disregarding the no prior restraint doctrine justified its action on the basis of two factors: purpose and privacy; these two factors cannot be used to restrain distribution of literature. State created labels such as invalid purpose or privacy "can claim no talismanic immunity from constitutional limitations. [They] must be measured by standards that satisfy the First Amendment." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964).

1. The Relevance of the Disseminators' Purpose.

The Appellate Court of Illinois believed that petitioners did not have a proper purpose for the distribution of literature in Westchester because "the sole purpose was to force plaintiff to sign a "no-solicitation agreement." From this it concluded that petitioners' purpose "was not to inform the public of a matter of public interest" (A. 85). But contrary to this characterization it is clear that petitioners hoped that by informing the residents of Westchester of a matter of public interest respondent would agree to stop soliciting sales in petitioners' racially changing neighborhood. Petitioner William Holmes testified:

> "A. . . . my primary motive was to ask Mr. Keefe to make a public act of faith in the community where he is making his living, and because he failed to do

this — in fact he said that we don't want a thing to do with you, and we don't care about your community — so we went out and decided to let his, let his neighbors know what he was doing to us.

"Q. And, by doing this, you had hoped that he would finally sign this agreement that you submitted, is that right?

"A. Yes, Sir" (A. 58-59, 72).

Here, as in most speech, the speaker's goal is more than public information. It is directed toward influencing events. But this Court has not limited the protections of the First Amendment to those whose only interest is public information. *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4 (1949); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269-273 (1954); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388-389, 394-397 (1967); *Brandenburg* v. *Ohio*, 395 U.S. 444, 447-448 (1969). Speech may inform; it may embarrass, expose and persuade. Nevertheless it is protected against restraint. As the Court said in *Thomas* v. *Collins*, 323 U.S. 516, 537 (1945):

> "[T]he protection they [the Framers] sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."

If a disseminator's purpose determines the scope of the First Amendment's protection, little speech would remain immune from restraint. It is "the essence of censorship" to have to satisfy a judge that speech is "published with good motives and for justifiable ends." *Near* v. *Minnesota*, 283 U.S. 697, 713 (1931). See also *Garrison* v. *Louisiana*, 379 U.S. 64, 73 (1964). In *Near*, the Court was faced with

a statute permitting prior restraint by injunction if the publisher could not show truth, good motives and justifiable ends. *Near* v. *Minnesota*, 283 U.S. at 721. The Court there recognized that to require a showing that a publisher's ends are justifiable gives the legislature discretion to choose which ends it approves and to establish machinery to make this determination, be it by court or administrative agency. "And [this] would be but a step to a complete system of censorship." *Id.* at 721.

In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), this Court again discussed the excessive restraint which subjective tests such as motive or purpose impose on speech. There the state court of Louisiana affirmed a conviction for criminal libel on the basis that the evidence showed defendant made statements with "ill will, enmity, or a wanton desire to injure." *Id.* at 78. This Court considered "whether the historical limitation of the defense of truth in criminal libel to utterances published with 'good motives and for justifiable ends' should be incorporated into the New York Times rule . . .", *Id.* at 70-71, and held that such a test did not meet the constitutional standards established in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). See also *Beckley Newspapers* v. *Hanks*, 389 U.S. 81 (1967).

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison* v. *Louisiana*, 379 U.S. at 73.

The Appellate Court of Illinois, however, thought that distribution of literature could be enjoined because of a purpose with which it disagreed, on the basis of a false analogy to picketing. But picketing, which is more than

speech, does not enjoy the same protection as the distribution of literature. *Hughes* v. *Superior Court*, 339 U.S. 460, 464-466 (1950).

> "But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.' [citation omitted] Publication in a newspaper, or by distribution of circulars, may convey the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word." *Id.* at 464-465.

Therefore, regardless of the merits of the "unlawful purpose" doctrine with respect to picketing, it has no application here. Moreover, even the power of states to justify restrictions on picketing by declaring purposes unlawful is limited by the First Amendment. In *Food Employees* v. *Logan Plaza*, 391 U.S. 308 (1968), this Court stated that is is constitutionally impermissible to prohibit picketing of a business "on the *sole* ground that it is conducted by persons not employees whose purpose is to discourage patronage of the business." *Id.* at 315.

Indeed, neither the Illinois trial court nor Appellate Court found that petitioners' purpose was sufficiently against public policy so as to justify a prohibition against picketing in all places.[6] Thus the courts of Illinois have

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[6] Respondent sought to restrain picketing by petitioners near his place of business in Austin, but the trial court did not enjoin such picketing, and the Appellate Court of Illinois indicated its approval (A. 70, 80).

determined that a purpose with which they disagree can be used to restrain the distribution of literature even when that same purpose would not justify a total prohibition on picketing. This turns the First Amendment on its head.

2. The Prohibited Zone of Privacy Theory of the Illinois Courts.

In support of its conclusion that petitioners' "right of 'free speech' is not involved here" the Illinois Appellate Court claimed that the distribution of literature by petitioners in Westchester invaded respondent's right of privacy (A. 85-86). However, the First Amendment does not permit a court, at the behest of a suburban resident, to insulate that suburb from the distribution of leaflets concerning his involvement in another part of the metropolitan area in a matter of major public concern.

This Court decided in *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967), that First Amendment rights took precedence over the alleged privacy interest asserted there. In that case it was held that defendant's publication on a matter of public interest even if false was constitutionally protected and that for plaintiff's privacy action to succeed he would have to prove that the statements were made with knowledge of their falsity or in reckless disregard of the truth. *Time, Inc.* v. *Hill,* 385 U.S. at 387-388. In the case at bar there was neither an allegation in the complaint nor a finding by the trial court that the statements about respondent were made with knowledge of their falsity or in reckless disregard of the truth. Indeed, there was no finding that petitioners' statements were untrue!

The problems created by real estate practices in racially changing neighborhoods are matters of public interest. See Prosser, *Handbook of the Law of Torts,* §112 at

844-850 (3rd ed. 1964). For example, these problems have been publicized in newspapers and magazine articles[7] and discussed in an opinion of the Illinois Supreme Court.[8] Clearly, discussion of subjects such as that involved here, which in addition to being of interest are of social concern, is more needed "to enable the members of society to cope with the exigencies of their period" than the subject involved in *Time, Inc.* v. *Hill.*[9] *Time, Inc.* v. *Hill*, 385 U.S. at 388, quoting from *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940); *cf. Time, Inc.* v. *Hill*, 385 U.S. at 415 (Dissenting opinion of Mr. Justice Fortas).

Businessmen cannot expect to be free from public scrutiny when their business practices touch on such matters of public concern. Austin, in 1967, was a racially changing neighborhood at the western edge of the Chicago west side black ghetto. Certainly respondent who chose to actively solicit for sale the homes of residents immediately west of the present segregated area, knew or should have known, that such practices of real estate brokers in changing areas are a matter of serious and

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[7] *Confessions of a Blockbuster*, Saturday Evening Post, July 14, 1962, at 15-19; *How We Beat the Blockbusters*, Saturday Evening Post, March 23, 1968, at 50-55; *Attack Against Blockbusting: Chicago Court Action*, U.S. News and World Report, April 7, 1969, at 8; *Spotlight on Blockbusting: Unscrupulous Realtors and Unthinking Community; a Baltimore Study*, 120 America at 563-564 (May 10, 1969); *Unbusted Blocks*, Newsweek, December 1, 1969, at 55; Chicago Daily News, August 11, 1970, at 3, col. 1.

[8] *Chicago Real Estate Bd.* v. *City of Chicago*, 36 Ill. 2d 530, 533-534, 553, 224 N.E. 2d 793, 797, 807 (1967).

[9] In *Time*, a magazine was alleged to have falsely reported that a new play portrayed an experience suffered by plaintiff and his family when held hostage by escaped convicts in plaintiff's home. *Id.* at 377-378.

continuing public interest. His participation in such practices involved the risk of exposure which "is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Time, Inc.* v. *Hill*, 385 U.S. at 388.

Yet, the Appellate Court of Illinois implies that because "[T]here was no evidence to show that plaintiff was engaged in 'panic peddling' in Westchester or that he intended to do business in Westchester," the subject of his real estate activities in Austin was improper for Westchester and that the distribution of literature on this subject in Westchester constituted an invasion of respondent's privacy. The thrust of this privacy justification for the injunction is that the very presence of petitioners distributing literature critical of respondent in his city of residence invaded his privacy.

Illinois appears to be alone in defining the presence of persons passing out leaflets "to residents of some homes in the neighborhood of plaintiff's [respondent's] place of residence, to some people at a shopping center in Westchester, and to some parishioners on their way to or from Mass at Divine Infant Church in Westchester," (A. 69) as an invasion of respondent's privacy. Such presence does not come within the "four distinct kinds of invasion of four different interests of the plaintiff" which have been subsumed under the law of privacy: (1) appropriation of another's name; (2) unreasonable intrusion upon the seclusion of another; (3) unreasonable publicity which places another in a false light before the public; and (4) unreasonable publicity given to another's private life. Prosser, *Handbook of the Law of Torts*, §112 at 832-844 (3d ed., 1964); Restatement (Second) of Torts, §§652A, 652B, 652C, 652D (Tent. Draft No.

13, 1967). This is clearly not a case of appropriation. The intrusion cases are not in point since the contacts respondent complains of were with third persons and not with respondent and did not concern his private affairs. Prosser, *supra*, §112 at 833-834; see also *Nader* v. *General Motors*, 25 N.Y. 2d 560, 567-569, 255 N.E. 2d 765, 769-770 (1970). This cannot be a false light case since there has been no finding of falsity. *Time, Inc.* v. *Hill*, 385 U.S. 374, 383-388 (1967); Prosser, *supra*, §112 at 843. Finally, the subject matter of petitioners' leaflets clearly prevents this from being a case of unreasonable publicity given to another's private life. Prosser, *supra*, §112 at 844-850.

The purported privacy interest asserted by respondent, based on the presence of persons distributing critical leaflets in his town, is far less substantial than that asserted by communities who have attempted to justify restraints on literature distribution in earlier cases. In *Martin* v. *Struthers*, 319 U.S. 141 (1943), the city sought to justify an ordinance which prohibited persons who distributed leaflets from summoning residents to the door to receive those leaflets on the ground that ringing doorbells in that industrial town disturbed the many residents who worked the swing shift and slept during the day. However, the Court in *Martin* held that the "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society" that the community could not substitute its judgment for the judgment of the individual householder as to what literature the resident should receive; the First Amendment guarantees both the right to distribute literature and "the right to receive it." *Martin* v. *Struthers*, 319 U.S. at 143-144, 146-147. See also *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *Rowan* v. *United*

States Post Office, 397 U.S. 728, 736-738 (1970). And the offensiveness of the views of persons who distribute literature or speak to some or even most of the residents of a community provides no justification for a prohibition on peaceful dissemination of such views. *Cantwell* v. *Connecticut*, 310 U.S. 296, 301-303, 308-311 (1940); *cf. Pickering* v. *Board of Education*, 391 U.S. 563, 569-572 (1968). Even locations, such as public schools, which unlike the public ways and doorsteps of Westchester, have not traditionally been considered open to First Amendment activities, may not be made enclaves in which such activities can be prohibited. *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 511 (1969).

The Illinois courts cannot under the guise of privacy insulate respondent in his city of residence from exposure and criticism by petitioners of his real estate practices in Austin. By making Westchester "off limits" to petitioners' distribution of literature, Illinois has granted respondent censorship power, the power to prevent other residents of Westchester from receiving literature critical of him. This courts cannot do.

II. THE INJUNCTION PROHIBITING LITERATURE DISTRIBUTION AND PICKETING ANYWHERE IN THE VILLAGE OF WESTCHESTER IS UNCONSTITUTIONAL BECAUSE IT IS OVERBROAD

The Illinois courts have issued and sustained this injunction against the distribution of literature and picketing anywhere in the Village of Westchester, absent any allegation or evidence that petitioners had engaged in picketing in Westchester.

While the right to picket may not be absolute, "[s]tate courts, no more than state legislatures, can enact blanket

prohibitions against picketing."[10] *International Brotherhood* v. *Vogt*, 354 U.S. 284, 295 (1957). Accord, *Thornhill* v. *Alabama*, 310 U.S. 88, 104-105 (1940).

Furthermore, a court may not resolve the complex issues, including constitutional ones, which picketing situations raise, in the absence of a specific factual context. *International Brotherhood* v. *Vogt*, 354 U.S. at 294-295; *cf.*, *Carroll* v. *Princess Anne*, 393 U.S. 175, 183-184 (1968). A valid governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

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[10] The cases cited by petitioners, *supra*, with respect to the invalidity of restraints on the distribution of literature also establish the invalidity of blanket prohibitions on literature distribution, and of course it certainly follows that if picketing may not be subject to blanket prohibitions, the distribution of leaflets may not be subject to such restraint. See *Kirkland* v. *Wallace*, 403 F.2d 413, 416 (5th Cir. 1968).

CONCLUSION

For all the reasons stated above, the injunction should be declared unconstitutional and dissolved.

Respectfully submitted,

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